Supreme Court, U.S.
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In the Supreme Court
of the United States

Robert L. Voit, Petitioner
v
Kentucky, Respondent

On Petition for Writ of Certiorari to
Jefferson Circuit Court (Div 3)
in Kentucky

Petition for Writ of Certiorari

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Questions Presented for Review

Issue 1: May a state court convict a person for a misdemeanor offense not clearly charged in the complaint?

Issue 2: Does a defendant, when assisted by counsel, lose his 6th Amendment right to cross-examine a witness himself ?

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Opinions Below

The opinion of the Jefferson Circuit Court (Division 3) in Louisville, Kentucky, whose judgment is here sought to be reviewed, is unreported and is printed in appendix starting on page 25.

The docket entry of judgment of the Jefferson District Court (the trial court) is "25 01/21/98 125 TR-121 PHG 9800 FINE COST 2-2 TR121"

Statement of Jurisdiction

Order sought reviewed: The Jefferson Circuit Court, on July 14, 1998, entered its "Order and Opinion" (appendix pages 25-29) which petitioner now asks this court to review.

After this July 14 order, petitioner sought and was denied further state review as follows:

Denial 1: Petitioner's motion for reconsideration by the Jefferson Circuit Court was filed July 24,1998 and the Court's order denying it (appendix page 32) was entered September 1, 1998.

Denial 2: Petitioner's motion for discretionary review by the Kentucky Court of Appeals was filed October 1, 1998 and the Court on December 8, 1998 entered its order denying review (appendix page 33).

Denial 3: Petitioner's motion for discretionary review by the Kentucky Supreme Court was filed December 28, 1998, and the Court on August 18, 1999, entered its order denying review. (appendix page 34)

Having pursued, in a timely manner, all available options for state review, petitioner now seeks this Court's review pursuant to 28 U.S.C. 1257.

Regulation and Constitutional Provision Involved

The United States Constitution Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Louisville and Jefferson County Board of Health Sanitary Code, Chapter 8, Rule 4, Section 804.604:

> 804.604 Building Maintenance. No person shall occupy as owner-occupant or let to another for occupancy nor shall any person occupy any dwelling or dwelling unit for the purpose of living therein, which does not comply with the following requirements: (The section goes on in sub-sections (a) through (m) to define requirements.)

Statement of the Case

Petitioner, not the owner of the property involved, was brought before a trial court (Jefferson District Court case #97M001819A) by a criminal complaint (appendix page 10) alleging that he violated the health code Chapter VIII Rule 4 (a 15 page long rule) by permitting a dwelling unit to be occupied, which was in disrepair.

The applicable part of Rule 4 is Section 804.604 (appendix page 10), which, if a dwelling unit has certain maintenance defects, defines three possible violations:

(V1) occupying as owner occupant,
(V2) letting to another for occupancy, and
(V3) occupying for the purpose of living therein.

At trial the prosecution was unable to prove either V2 (the violation which the complaint appears to charge) or V1. Petitioner moved for directed acquittal, and the Court denied, holding that there was evidence of occupying (V3). When petitioner objected that he was not charged with "occupying", the Court held (appendix pages 23-24, lines numbered 5351-5369) that the charge of "occupying" could be inferred from the complaint because a person who "occupies" also "permits" himself to occupy.

Sometime before the motion for directed acquittal, at a point in trial when Mr. Voit was not fully satisfied with the way his counsel was conducting cross-examination of witness Humphrey (his principal accuser), Mr. Voit sought to cross-examine Humphrey himself. The prosecutor objected that "double teaming was not allowed" (appendix pages 20-21) and the Judge prevented Mr. Voit from asking any questions directly. He did this even though earlier, before cross-examination began, the Judge said (appendix page 20) that Mr. Voit AND his attorney could cross-examine this witness.

Based chiefly on Humphrey's testimony the prosecutor presented the case to the jury which on 1/21/98 returned a verdict of guilty and recommended a fine of $9800. Within two minutes thereafter the Court continued for sentencing, but instead privately imposed sentence of $9800+costs, apparently the same day.

Petitioner appealed his judgment of conviction to the Jefferson Circuit Court, raising the question of adequate notice as is-

sue 3 and the denial of confrontation as issue 4, arguing on both issues a violation of the United States Constitution 6th Amendment as well as violation of state constitutional requirements. (The statement of appeal treatment of these two issues in the appendix pages 12-19.)

The Jefferson Circuit Court (Div 3) affirmed the trial court's judgment. Regarding notice the Court held (see appendix page 27, lines 12-13) "the Criminal Complaint sufficiently charged Appellant" and it neither mentioned nor made any effort reconcile its holding with any of the numerous U.S. Supreme Court decisions cited by petitioner. Regarding confrontation (appendix page 27, middle paragraph), the Circuit Court held (H1) that the trial court prevented Mr. Voit from confronting his accuser because the witness "had already been thoroughly questioned by Appellant's counsel." It further held that this was permissible because (H2) a trial judge has discretion as to the scope and duration of cross-examination and (H3) allowing the defense counsel to confer with Mr. Voit and ask additional questions prevented any prejudice to the Appellant.

Petitioner filed a motion for discretionary review by the Kentucky Court of Appeals, and when that was denied, filed a similar motion with the Kentucky Supreme Court. In both motions notice was raised as issue 1 and confrontation as issue 2. In both motions petitioner (1) asserted denial of both federal and state constitutional rights to notice and to confrontation; (2) cited *United States v. Cruikshank*, 92 U.S. 542 (1875) and numerous other U.S. Supreme Court cases regarding adequate notice; and (3) on confrontation, cited the 6th Amendment—thus making the courts aware of the US Constitutional issues involved.

Reasons for Granting the Writ

Regarding notice: Over the years, this nation's highest court has applied the notice requirement of the 6th Amendment and has repeatedly held that all elements of an offense must be charged clearly and accurately and not just by inference. Petitioner's Statement of Appeal cited numerous such cases and quoted from five (see appendix pages 12-14). Had the court in Kentucky cited or quoted these cases and then said "These are the standards that the Supreme Court held to be required by the United States Constitution, but we are not going to follow them.", is there any doubt that this case would be ripe for review (and probably by way of summary disposition)? Petitioner now asks, "Can a state court accomplish the same defiance/evasion of constitutional requirements by not mentioning them?" The opinion of Kentucky's Jefferson Circuit Court makes no effort to reconcile its decision with case law cited by petitioner, and petitioner's Motion for Reconsideration (appendix page 30) together with the Circuit Court's response (appendix page 32) should convince that the omission was not an oversight.

Regarding confrontation: This is a case where the petitioner was prevented from cross-examining his accuser because the prosecutor objected to "double teaming." (That is the only reason given in the record for the court's ruling.) Now, one wouldn't object to "double team" medical care from paramedics or surgeons. One objects to double teaming when one wants to the limit the effectiveness with which a task is performed. And task the trial court chose to limit was the presentation of the petitioner's side of the case to the jury through effective cross-examination.

This limitation is repugnant to the Bill of Rights. The 6th Amendment promises assistance of counsel, and assistance implies the option of a "double team" effort. Which of you, if dissatisfied with the performance of an assistant, would believe you had no right to perform the task yourself?

Contrary to the Jefferson Circuit Court's Opinion, the trial court's ruling was not one to limit the scope or duration of questioning (matters over which the trial judge has discretion); rather, it limited WHO could ask questions. It allowed further questions,

but none by Mr. Voit personally. Further note that this matter of whether or not a defendant can personally confront his accuser, is one that the fathers of our Constitution decided not to trust to the discretion of the trial judge.

To petitioner's knowledge, this Court has not ruled definitively on the issue of "double teaming." Cross-examination is so fundamental to a fair trial, that petitioner asks this court to grant certiorari and extinguish the notion that a defendant's cross-examination may be limited for the purpose of giving the prosecutor a better hand before the jury.

==========

Respectfully submitted,
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APPENDIX

Criminal Complaint

(From written record pg 8 and 18)

The Affiant, Michael Humphrey, says that on 3/15/96 thru 1/23/97 (98 days) in Jefferson County, Kentucky, the above-named defendant unlawfully violated Chapter VIII, Rule 4 of the Louisville and Jefferson County Board of Health Sanitary Code by permitting a dwelling unit to be occupied which does not comply with the following requirements shown on Exhibit Number 1, attached hereto as if incorporated herein. Violations exist at 12104 Old Shelbyville Road. An order of abatement was issued on 10/16/96.

Health Code Sections

804.610(n): Owner shall mean any person who, alone or jointly or severally with others:

a: Shall have legal title to any dwelling or dwelling unit, with or without accompanying actual possession thereof; or

b: Shall have charge, care, or control of any dwelling unit, as owner, or as executor, executrix, administrator, administratix, trustee or guardian of the estate of the owner. Any such person thus representing the actual owner shall be bound to comply with provisions of these rules and regulations imposed upon the owner.

804.604: Building Maintenance. No person shall occupy as owner-occupant or let to another for occupancy nor shall any person occupy any dwelling or dwelling unit for the purpose of living therein, which does not comply with the following requirements:

(The section goes on in sub-sections (a) through (m) to define requirements.)

804.611(b): Any violation of these rules and regulations or of any health regulation promoted by the Board of Health, or of any order made by the Board of Health directing the abatement of a nuisance, source of filth, or cause or probable cause of sickness, is hereby declared a misdemeanor and any person, firm, corporation, or member of a firm or officer or director of a corporation, upon con-

viction thereof, shall be fined not less than $5.0 nor more than $100.00 for each offense. If any offense is continued for more than one day, each day upon which such offense occurs or is continued, shall be considered and shall constitute a separate offense and a separate fine may be imposed therefor.

Statement of Appeal (portions)

From Statement of Appeal portion Regarding Notice
ISSUE 3

Issue: The trial court erred when it ruled that the charge of "occupying..." (V3 in paragraph 6 of Issue 1 above) could be inferred to be part of the complaint even though it was not clearly alleged therein.

Laws and Rulings: The *Kentucky Constitution, Section 11* provides that "In all criminal prosecutions the accused has the right ... to demand the nature and cause of the accusation against him." And *RCr 2.02* states: "The complaint is a written statement of the essential facts constituting the offense charged."

The *United States Constitution, Amendment 6* guarantees that "the accused shall enjoy the right ... to be informed of the nature and cause of the accusation. The United States Supreme Court (and other appeals courts) have applied this and repeatedly held that all elements of an offense must be charged clearly and accurately and not just by inference. One finds such holdings in many cases including: *United States v. Cook*, 17 Wall. 174 (1872), 84 U.S. 168, 174; *United States v. Cruikshank*, 92 U.S. 542, 556 (1875); *United States v. Simmons*, 96 U.S. 360, 362 (1877); *United States v. Carll*, 105 US 611, 612-613 (1881); *United States v. Hess*, 124 U.S. 483, 487-488 (1888); *Commonwealth v. Ward, &c.*, 92 Ky. 159, 162, 17 S.W.2d 283 (1891); *Pettibone v. United States*, 148 U.S. 197, 202 (1893); *Evans v. United States*, 153 U.S. 584, 587 (1893); *Rosen v. United States*, 161 U.S. 29, 40 (1896); *Clyatt v. US*, 197 U.S. 207, 218-220 (1905); *Russell v. United*<18> *States*, 369 U.S. 749, 763-765, 768 (1962); and *U.S. v. Superior Growers Supply, Inc.*, 982 F.2d 173 (6th Cir. 1992), 176-177.

We quote from a few of these cases with emphasis added by bold typeface. In *United States v. Cruikshank*, 92 U.S. 542, 556 (1875):

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to

> mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; ' and in *United States v. Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.'" (at 556-557)
>
> "... **Every thing essential must be charged positively, and not inferentially.** The defect here is not in form, but in substance." (at 556)

In *Pettibone v. United States*, 148 U.S. 197, 202 (1893):

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, **if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication**. The charge must be made directly, and not inferentially, or by way of recital. *U. S. v. Hess*, 124 U.S. 486, 8 Sup. Ct. Rep. 571."

In *Evans v. United States*, 153 U.S. 584, 587 (1893):

> "**Even in the cases of misdemeanors, the indictment must be free from all ambiguity**, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, ...

In *Russell v. United States*, 369 U.S. 749, 765 (1962):

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, **without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence** intended to be punished; . . .' *United States v. Carll*, 105 U.S. 611, 612."<19>

In *U.S. v. Superior Growers Supply, Inc.*, 982 F.2d 173 (6th Cir. 1992), 177:

> "... **To be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime.** *Fleisher v. United States*, 302 U.S. 218, 58 S.Ct. 148, 82 L.Ed. 208 (1937) (per curiam); see also *United States v. Polychron*, 841 F.2d 833 (8th Cir.), cert. denied, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 107 (1988)."

Application: When asked to reconsider its ruling denying a directed verdict or acquittal, the trial court (*VcrTape 309A 1/21/98 12:53:18-47 TR:5347-5356 see appendix part 6*) examined the complaint, quoted its wording: "By permitting a dwelling unit to be occupied which does not comply with-" and then the court stated "Well then it begs the question: if a person is occupying is - is that person permitting himself or herself to occupy? And I think that's - a reasonable inference could be made-". With this reasoning the trial court again denied a directed acquittal.

The trail court's ruling (that a charge of "occupying..." could be inferred) stands in stark conflict with the principle of clear and accurate pleading (see bold portions of the quotes above) which the Supreme Court of the United States has held and affirmed repeatedly over a period of many generations.

If one pretends, as the trial court held, that the complaint is actually charging the offense of "occupying a dwelling for the purpose of living therein, which does not comply ...", then one quickly concludes that the complaint as worded is inadequate for that purpose. It does not meet the standard for legal sufficiency quoted above from *U.S. v. Superior Growers Supply, Inc.* -- it does not assert facts which, if proved, would<20> establish the defendant's commission of that crime. Proof of facts asserted in the wording of the actual complaint, namely that the accused "permitted a dwelling to be occupied which does not comply ..." would not establish the defendant's commission of the crime of "occupying...". Furthermore, because the actual complaint does not allege that the accused occupied the dwelling, it fails to state the all essential facts constituting the offense (pretended) charged, as required by RCr 2.02, and is inadequate by that standard, as well.

When a defendant, faced with evidence that he has committed a different offense (other than the one with which he is charged), offers in court little or no defense (because of a lack of notice or for any other reason), is it appropriate for the judge to get a conviction by pretending the complaint somehow alleges that which it clearly doesn't? Appellant answers by reference to the words Mr. Justice Brewer delivering the opinion of the Supreme Court of the United States in *Clyatt v. US*, 197 U.S. 207, 218-220 (1905):

> "Section 5526 punishes 'every person who holds, arrests, returns, or causes to be held, arrested, or returned.' Three distinct acts are here mentioned,-holding, arresting, returning. The disjunctive 'or' indicates the separation between them, and shows that either one may be the subject of indictment and punishment. ...
>
> "The indictment charges that the defendant did 'unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly, and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt.'
>
> "Now a 'return' implies the prior existence of some state or condition. ...
>
> "It was essential, therefore, under the charge in this case, to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. **We are not at liberty to transform this indictment** into one charging that the defendant held them in<21> a condition or state of peonage, or that he arrested them with a view of placing them in such condition or state. The pleader has seen fit to charge a return to a condition of peonage. **The defendant had a right to rely upon that as the charge, and to** either offer testimony to show that Gordon and Ridley had never been in a condition

> of peonage, or to **rest upon the government's omission of proof** of that fact."

At trial there was evidence that the accused had arrested Gordon and Ridley with the view of placing them in condition of peonage. The Supreme Court could have pretended that the allegation of arresting was somehow part of the indictment. It didn't. That kind of pretense was not appropriate then, it's not appropriate today.

Conclusion: The trial court's inference of a charge of "occupying" was improper and as shown above (Issue 1) there was insufficient evidence to support the only remaining charge of "permitting"; hence, appellant was entitled to a directed verdict of not guilty. He is now entitled to an order of acquittal.

From Statement of Appeal portion Regarding Confrontation

ISSUE 4

Issue: The trial court violated the rights of Mr. Voit when it prohibited him from cross examining Mr. Humphrey, his chief accuser.

Laws and Rulings: The *Kentucky Constitution, Section 11* requires:

> "In all criminal prosecutions the accused has the right to be heard by himself and counsel; ... ; to meet the witnesses face to face, and ... ."

The *Kentucky Constitution, Section 9* states:

> "Right of trial by jury. The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."<22>

The *United States Constitution, Amendment 6* requires:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... ; to be confronted with the witnesses against him; ... and to have the assistance of counsel for his defense.

Application: Appellant begins by presenting the content of a bench conference (*VcrTape 309A 1/21/98 11:47:03-29*):

4318 Def_Atty_: May we approach for one minute?
4319 Court____: Sure.
4320 Def_Atty_: I just wanted to advise the court that
4321 Mr. Voit wishes to ask a few questions of Mr. Humphrey.
4322 Prosecutr: I (inaudible) object ah I think ah they
4323 can have one counsel inquire. Double teaming is not
4324 allowed. I (inaudible) object.
4325 Def_Atty_: I-
4326 Court____: Your objection is sustained. If you
4327 wanna if you wanna break for a minute and (inaudible)
4328 Def_Atty_: Yea, then let's do that.

Apellant challenges the trial court's ruling, (1) because of its conflict with the state and federal constitutions, (2) for the improper and unjust purpose stated in support thereof, (3) on the basis

of common sense fairness, and (4) because it breaks the trial court's own promise made earlier in the trial.

(1) There is no process more fundamental to the conduct of a fair trial than the process of effective cross examination. And one standard of effectiveness, one set by our constitutions, is face to face confrontation. This means the right of an accused to personally cross examine witnesses. What else is this right "to meet the witnesses face to face"? Is it merely the right to say hello in pretrial conference? No, this promise is made in the context of a trial. Without the right to cross examination, the 6th Amendment (and Section 9) right to a trial is empty promise. And without the right to personally cross examine one's accusers, the Section 11 (and 6th Amendment) right to meet face<23> to face is equally empty of promise.

To finish this point appellant asks, does a defendant lose his right to cross examine witnesses when he obtains the assistance of counsel and permits that counsel to examine a witness? Without considering the United States Constitutional issues, appellant turns attention to the Kentucky Constitution which speaks more directly to this point declaring: "the accused has the right to be heard by himself AND counsel" (in all matters before the court). The Constitution's use of the word AND answers the question and tells us that both the defendant and his counsel have the right to be heard. Appellant has added the words in parenthesis to give his answer to other questions: What is the context in which this right to be heard is promised? Does a defendant have the right to be heard at arraignment, but not in motions, cross examination, or closing agruments? Appellant's answer is that the right to be heard is in the context of the criminal prosecution and all matters before the court.

(2) Appellant next directs attention to the reason given by the prosecutor (and accepted by the court) for prohibiting Mr. Voit from cross examining has accuser: "Double teaming is not allowed." What is implied by "double teaming"? Why do police "double team" interrogate suspects? Two people can be more effective than one. One wouldn't object to "double team" medical care from paramedics or surgeons. One objects to double teaming when one wants to the limit the effectiveness with which a task is performed. And what is the task the trial court wanted performed with less effectiveness? The presentation of the appellant's case to

the jury through cross examination. It seems<24> the trial court has denied appellant the right to question his accuser in order to limit, hence partially deny, the appellant's right to trial by jury.

(3) Now appellant considers a question of common sense. Defense counsel did not (and could not as a practical matter) have the detailed knowledge of conditions and events that defendant had. Counsel was therefore unprepared to and unable to ask the kind of detailed questions based on a detailed knowledge of circumstances, need to effectively trap a lying misleading witness. As a matter of fairness, defendant should have been allowed to cross examine the witness.

(4) Finally, appellant addresses the trial court's breach of its own promise. At an earlier point in the trial (*VcrTape 308A 1/20/98 18:00:40-03:53*) appellant objected that the prosecutor had used leading questions and raised his voice to push his own witness into changing his answer to a question which had already been asked and answered. The court overruled the objection and said (*VcrTape 308A 1/20/98 18:03:40-49*): "... he is laying a foundation. I'm going to let him lay a foundation, and it is subject to your cross examination and your attorney's cross examination." Mr. Voit now objects that the trial court, having recognized his right to personally confront the witness with questions, would so quickly deny that right.

Conclusion: There is no right more essential to the conduct of a fair trial than the right to effectively cross examine one's accusers. When a trial court has suppressed that right, its judgment of conviction cannot stand. Appellant asks for an order<25> of acquittal.

Trial Record (portions)

Trial Record—
On cross-examination by defendant and attorney

From bench conference regarding the prosecutor's
examination of witness Humphrey. Bold portion at
(*VcrTape 308A 1/20/98 18:03:40-49*)

2139 Prosecutr: and without that terminology without me
2140 allowing - being allowed to ask that question, there's
2141 no way to lay any foundation for any photograph.
2142 Defendant: The point is the man gave a different
2143 answer the first time the question was asked and then
2144 he comes back and he says now here is the answer I want
2145 you to give by leading him. The manner in which he
2146 asked that question made it real clear what answer he
2147 wanted.
2148 Court____: Sir he's allowed to ask follow up
2149 questions. He is.
2150 Defendant: But not leading questions.
2151 Court____: I would agree. (inaudible) he is
2152* laying a foundation. **I'm going to let him lay a**
2153* **foundation and it is subject to your cross-examination**
2154* **and your attorney's cross-examination.** But it is a
2155 proper question to ask.

Trial Record—On double teaming

bench conference (*VcrTape 309A 1/21/98 11:47:03-29*):

4318 Def_Atty_: May we approach for one minute?
4319 Court____: Sure.
4320 Def_Atty_: I just wanted to advise the court that
4321 Mr. Voit wishes to ask a few questions of Mr. Humphrey.
4322 Prosecutr: I (inaudible) object ah I think ah they
4323 can have one counsel inquire. Double teaming is not
4324 allowed. I (inaudible) object.
4325 Def_Atty_: I-

4326 Court____: Your objection is sustained. If you
4327 wanna if you wanna break for a minute and (inaudible)
4328 Def_Atty_: Yea, then let's do that.

Trial Record—On directed acquittal and implied charge

VcrTape 309A 1/21/98 12:47:39+-12:54:29
5249* **Court____: Motion for directed verdict is**
5250* **overruled. Ah and basically I've written down some**
5251* **reasons too: ah that he was represented by by counsel,**
5252* **he was present, he did admit it, there is enough**
5253* **corroboration to go forward ah and we will do so.**
5254 Def_Atty_: Ok. We're gonna need a few minutes
5255 judge.
5256 Court____: Of course.
5257 Def_Atty_: Ok. I don't know what time you want
5258 the jury to break or if you want them to break. It's
5259 10 of 12.
5260 Court____: What I think what we ought to do is
5261 invite em back in. Let's order them lunch.
5262 <1:54:00=12:49:39> When the lunch comes in take a
5263 break if it's at a convenient time.
5264 Def_Atty_: I don't think they'll order lunch while
5265 they're just trial's going on I think they gotta wait.
5266 If they're deliberating they get lunch.
5267 Defendant: Your honor,-
5268 Def_Atty_: They - they might want a-
5269 Defendant: Could I ask you to reconsider on one
5270 point. The definition if you read it carefully not
5271 only says that a person has to represent the owner but
5272 it has to represent the owner in one of these
5273 capacities that they've listed-
5274 Court____: And I read that but I also-
5275 Defendant: and they have not alleged any<42>
5276 particular - I mean which capacity are they alleging
5277 that I represented the owner.
5278 Def_Atty_: That - that is our contention
5279 (inaudible)
5280 Defendant: And they they he he ask asked ah Mr.

Humphrey ah on each of those issues do you have any evidence that - you known - Mr. Voit was: the actual owner, - you know and he went through the list.

Court____: My response to that is 804.604 states that no person shall occupy as owner occupant or to let another for occupancy nor shall any person occupy any dwelling or dwelling unit for the purpose for living therein which does not comply with the following requirements.At that point Mr.Humphrey went through a whole list a b I think c d and I think the next one was i ah and j. And then there's a list ah and that is the basis of the court's decision. I think by your appearance to meet with ah the housing I'm sorry the department of health. Your having a - a lawyer representing you both when you met with the health department, when you allegedly met with the health department, and at the <1:56:00=12:51:38>hearing ah is sufficient to meet the standard for occupancy and for representing the owner. And that is my ruling.

Defendant: I'm sorry a lawyer representing me when?

Court____: I I thought a lawyer-

Prosecutr: At the hearing.-

Court____: had represented-

Prosecutr: There was that so called hearing in December.

Court____: you as I understand his testimony at the-

Def_Atty_: It wasn't-

Court____: with the hearing officer.

Def_Atty_: The testimony was that the family lawyer Terry Wetherby was there - the family lawyer. There is no evidence that Mr. Voit had any communication with Miss Wetherby.

Prosecutr: Except the day that they went out-

Court____: Except the day that they were there on the 15th.

Prosecutr: Mr. Voit was there and the so called family lawyer was there.

Defendant: Which was-. The question: was she representing me? Is there any evidence she was representing me?

Def_Atty_: My my - getting back to the basic-

Prosecutr: Oh I'm sorry

Court____: But the problem is this this issue again with occupancy and I believe that there is a su - sufficient-

Defendant: Well well they would have had a good case if they had charged in that way, but-

Def_Atty_: Don't-<43>

Court____: corroboration of of occupation-

Defendant: A better case.

Court____: and that's my ruling.

Def_Atty_: See that's that's the basis I guess well we have relied - we rely on the complaint against Mr. Voit, from day one. And I have told the commonwealth since at least August that we were relying - that Mr. Voit is not the owner, is not the executor-. This house and property to this day is owned by someone else - who's not even you know. And but they never amended their complaint. They chose to go forward having him charged as a person who does exercise some control over the property rather than amending the complaint that's - they could have amended this complaint to say he occupied the property. They chose not to do so, and we have relied upon.

Court____: Lets see the complaint.

Def_Atty_: I mean it - and it is critical, I think the language of there about permitting - permitting has a meaning.

Court____: By permitting a dwelling to be occupied which does not comply with-. Well then it begs the question <1:58:00=12:53:38> if a person is occupying is - is that person permitting himself or herself to occupy and I think that's a reasonable inference could be made-

Defendant: But at this point you look at the code and you see what's illegal - you look through the code

and look for something that corresponds to - to the charge and you find that it's not a person permitting himself to occupy. There's something in there that makes a great deal of sense, and and that's

Court____: Given the testimony so far and and for the purposes of directed verdict, that is overruled. Folks you still have an excellent argument before the jury. And I'm sure you're going to make that at the appropriate time, and you have testimony you want to introduce.

Court____: Give me just 30 seconds folks.

Jefferson Circuit Court – order and opinion being challenged

This opinion has been retyped from it's original 8.5 x 11 format. The numbers in brackets like <3> indicate the end of pages in the original document.

NO. 98-XX-0030 JEFFERSON CIRCUIT COURT
DIVISION THREE

ROBERT L. VOIT APPELLANT

v. OPINION AND ORDER

COMMONWEALTH OF KENTUCKY APPELLEE

****

This matter comes before the Court on appeal from the district court case styled Commonwealth of Kentucky v. Robert L. Voit, District Court No. 97M001819A. The judgment appealed from was entered on January 21, 1998. The Appellant, Robert Voit, filed Notice of Appeal on March 6, 1998. Pursuant to an extension, Appellant filed a pro se Statement of Appeal on May 5, 1998.

The complaint against Appellant, Robert Voit, charged him with permitting a dwelling unit in disrepair to be occupied. At the close of the prosecutor's case, Appellant moved for directed verdict of acquittal on the grounds that the Commonwealth was insufficient to establish Appellant's guilt. The trial court denied this motion and the case went to the jury which found that the Appellant had violated Chapter VIII, Rule 4 of the Louisville and Jefferson County Board of Health Sanitary Code. The jury returned a guilty verdict for each day of the charged offense (totaling 98 days) and imposed the maximum fine of $100.00 per day for a total fine of $9800.00.

Appellant's first issue raised in his appeal is that the evidence was insufficient to prove the charged offense. He does not contend that the said premises were not in disrepair, but rather <1> Appellant claims that the Commonwealth introduced no evidence of the Appellant's ownership of the dwelling.

Relying upon three (3) sections of the Sanitary Code, §§804.611(b), 804.601(n), and 804.604, Appellant argues in his Statement of Appeal (pp.7-8) that "[i]f a dwelling unit has any of the maintenance defects of subsections a-m then 804.611(b) as applied to 804.604 defines three possible violations a person could commit: (V1) occupying as owner-occupant; (V2) letting to another for occupancy; and (V3) occupying for the purpose of living therein." The Appellant incorrectly states that because the Criminal Complaint charged him with "permitting a dwelling unit to be occupied" that the Commonwealth must satisfy (V2), letting to another for occupancy (Statement of Appeal, p.8). However, the Appellant incorrectly analogizes the term "permitting" in the complaint with "letting to another for occupancy" as stated in (V2). The Commonwealth never charged the Appellant with leasing the premises to another person for occupancy, but rather claimed that he lived there during the period of October 16, 1996 to January 23, 1997.

On the contrary, Appellant violated §804.604 (V3) which forbids "occupy[ing] for the purpose of living therein." The Commonwealth introduced sufficient proof of occupancy in the form of testimony by Michael Humphrey, Environmental Specialist with the Jefferson County Board of Health. Humphrey testified that on one of his visits, Appellant admitted to him that he occupied the said premises, and was responsible for making repairs to the premises (VCR Tape 308 1/20/98, 16:54:10 - 17:45:59). Based on this evidence and other evidence presented by the prosecution, and the Appellant's inability to deny the disrepair of the property, the trial judge properly submitted the case to the jury.

Appellant also refers to §804.601(n). However, this section is entitled "Definitions" and <2> subsection (n) defines the word "Owner". This definition is inapplicable because the Commonwealth did not charge the Appellant as owner in the Criminal Complaint. The complaint alleged that the Appellant violated the Sanitary Code "by permitting a dwelling unit to be occupied which does not comply with the [maintenance requirements] ." Therefore, §804.604 is the properly applicable section of the Sanitary Code whereas §804.601(n) is not.

Finally, Appellant contends that "permitting a dwelling unit to be occupied," as alleged in the Criminal Complaint, is dif-

ferent from §804.604 (V3) "occupying for the purposes of living therein." Appellant argues that the Commonwealth would have to show that he was the owner of the property before showing that he could "permit" someone to occupy the property. However, the use of the word "permit" does not mean that the permission was authorized, but merely that such action was allowed to occur. Regardless of whether Appellant allowed another person or himself to occupy said premises, both acts are in violation of the ordinance. "Permit" is not solely limited to an act which affects another person. By Appellant "occupying" the premises, he was "permitting" himself to occupy such premises. Thus, the Criminal Complaint sufficiently charged Appellant and Appellant's contrary argument is without merit.

The next issue which the Appellant argues is that the trial court violated his rights when it prohibited him from cross-examining a witness, Michael Humphrey. However, Appellant had the assistance of counsel during the trial who cross-examined each of the prosecution's witnesses. The trial court sustained the Commonwealth's objection to defense counsel's request that Appellant be permitted to cross examine Michael Humphrey because he had already been thoroughly questioned by Appellant's counsel. It has been recognized in Kentucky that a trial judge has a wide range of discretion as to the scope and duration of cross-examination and he has <3> the authority to place reasonable limits upon cross-examination. See Skruggs v. Commonwealth, Ky., 566 S.W.2d 405 (1978); Department of Highways v. Smith, Ky., 390 S.W.2d 194, 195(1965). In addition, the trial judge did allow Appellant and his counsel time to confer outside of court to ensure that any questions the Appellant had could he raised by his counsel. This prevented any prejudice to the Appellant by limiting the cross-examination.

Appellant also contends that the trial court failed to properly impose his sentence because he was offered no opportunity to present evidence of mitigating circumstances pursuant to RCr 11.02. However, during the jury trial the trial judge gave the Appellant and his counsel the opportunity to present such information. Appellant chose not put on a defense, but instead rested at the close of the Commonwealth's case in chief, and offered only a closing argument.

There is no separate penalty phase for an offense where a fine can be imposed. The Appellant should have known that once the jury deliberation began, if the jury found the Appellant guilty, that they would also determine his sentence at that time. The jury instructions agreed upon by the parties included a range of possible fines and therefore any argument that the Appellant was unaware that the jury was also deciding punishment is not persuasive. Before releasing the jury, the judge also asked Appellant's counsel whether he had any additional information for the record and he responded in the negative. (VCR Tape 309A 1/21/98, 15:39:02). Any information which the Appellant wished to offer should have been introduced before the jury was released to deliberate. Finally, the judge asked for agreement that the judgment is final and entered as of that day (VCR Tape 309A 1/21/98, 15:39:11), and neither party objected. Appellant had many opportunities to present mitigating circumstances if he wished, but he failed to do so. He may not now use such failure as a successful ground for reversal on appeal.<4>

Appellant's final contention is that a statement was improperly admitted into evidence. The statement in question is the direct testimony offered by Michael Humphrey regarding his conversation with the Appellant concerning Appellant's occupancy of said premises. The Appellant argues that the statement is hearsay. However, the testimony falls under an exception to hearsay, an admission of a party, pursuant to KRE 801 A(b)(1), and is therefore properly admissible.

Upon review of the record, and being otherwise sufficiently advised, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED that the Judgment from District Court is hereby AFFIRMED.

s/ unreadable
WILLIAM E. MCANULTY, JUDGE
Jefferson Circuit Court
DATE ENTERED: 7/13/98

ENTERED IN COURT

JUL 14 1998
TONY MILLER, CLERK
By s/ Sing? Deputy Clerk

NO. 98-XX-0030 JEFFERSON CIRCUIT COURT
DIVISION THREE

ROBERT L. VOIT APPELLANT

v. **APPELLANT'S MOTION FOR RECONSIDERATION**

COMMONWEALTH OF KENTUCKY APPELLEE

****

NOTICE

Notice is hereby given to appellee that the following motion will be heard in Division 3 of Jefferson Circuit Court at motion hour 9:30 A.M., Monday, August 3, 1998.

MOTION

Comes the appellant pursuant to *CR 76.38* and in the spirit of *CR 76.32(1)(b)* and moves this honorable court to reconsider its order in this case entered in court July 14, 1998. Appellant seeks reconsideration of the court's order for reasons including the following:

1. In its "Opinion and Order" (page 3, lines 14-15) the court holds that: a criminal complaint alleging "the accused permitted a dwelling unit to be occupied" is legally sufficient to charge the accused with the crime of "occupying a dwelling unit for the purpose of living therein". This holding overlooks *RCr 2.02*'s requirement that a complaint state the essential facts constituting the offense charged. It also overlooks numerous controlling federal decisions (see "Statement of Appeal", Issue 3, pages 18-20) holding that all elements of an offense must be charged clearly and accurately and not just by inference. In this case the complaint failed to state (or even imply) that accused occupied the dwelling unit.

2. In its "Opinion and Order" (page 4, line 6 forward) the court overlooks the material fact that the trial judge, at the end of the last trial day, advised the litigants there would be further proceedings for sentencing, but instead privately imposed sentence the same day. The court misconceives the issue presented on the appeal - appellant never said that improper sentencing required reversal, but instead requested resentencing. Additionally, appellant believes the court misconceives the applicable law of *RCr 11.02(1)*, be-

cause it has not recognized that this rule addresses the procedure the trial judge must follow AFTER the jury has completed its deliberations and BEFORE he imposes sentence. The opportunity to present mitigation in that period was denied when the trial court privately imposed sentence.

CERTIFICATE OF SERVICE

It is hereby certified that on this day, July 24, 1998, a copy hereof was mailed to (1) Matt Golden, County Attorney's Office, 600 W Jefferson St, Louisville, KY 40202; and to (2) R. David Stengel, Office of the Commonwealth's Attorney, 514 W Liberty St., Louisville, KY 40202.

Robert L. Voit, ProSe
c/o David S. O'Brien
539 W Market St, 4th Fl
Louisville, KY 40202
(502) 587-7000

NO. 98-XX-0030 JEFFERSON CIRCUIT COURT
DIVISION THREE

ROBERT L. VOIT APPELLANT

v.

ORDER

COMMONWEALTH OF KENTUCKY APPELLEE

****

This matter comes before the Court on Appellant's Motion for Reconsideration, and the Court having considered said Motion, the record and otherwise being sufficiently advised;

IT IS HEREBY ORDERED that Appellant's Motion for Reconsideration be and the same is hereby denied.

This 28th day of August, 1998.

s/ unreadable
WILLIAM E. MCANULTY, JUDGE

cc: Robert L. Voit, Pro Se
Matt Golden
R. David Stengel

ENTERED IN COURT
SEP 01 1998
TONY MILLER, CLERK
By s/ H. Pumphrey Deputy Clerk

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-002496-DR

ROBERT L. VOIT MOVANT

v. ON MOTION FOR DOSCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
ACTION NO. 98-XX-0030

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * * * * * *

ORDER

BEFORE: COMBS, DYCHE, AND GUIDUGLI, JUDGES.

Having considered movant's motion to recuse this Court from hearing the above-styled, and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED.

Having also considered movant's motion to correct misstatements of the record and motion for discretionary review, this Court ORDERS that these motions be, and they are hereby, DENIED.

ENTERED: DEC 8 1998 s/ R.W.? Dyche
JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

98-SC-1138-D
(98-CA-2496)

ROBERT L. VOIT — MOVANT

JEFFERSON CIRCUIT COURT
V. 98-XX-0030

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied. The motion to correct misstatements of the record is also denied.

ENTERED August 18, 1999.

s/ J. E. Lambert
Chief Justice